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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO.: 2011 CA 1498

DIVISION: Civil

VERIZON BUSINESS PURCHASING, LLC,
a foreign limited liability company,

Plaintiff,

v.

STATE OF FLORIDA DEPARTMENT OF
REVENUE, an agency of the State of Florida,

Defendant.

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DEPARTMENT OF REVENUE
OFFICE OF GENERAL COUNSEL

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, Verizon Business Purchasing, LLC ("VBP") by and through counsel sues the State of Florida, Department of Revenue and alleges as follows:

The Parties

1. VBP is a foreign limited liability company formed in Delaware authorized to conduct business in the State of Florida.
2. Defendant, the Florida Department of Revenue (the "Department"), is an agency established under the laws of the State of Florida.

Jurisdiction and Venue

3. This is an action to contest an attempted assessment issued by the Department against VBP for sales and use taxes and interest made pursuant to Chapter 212, Florida Statutes.
4. VBP's Complaint is timely and any and all jurisdictional requirements under Fla. Stat. § 72.011 have been met or are otherwise reserved as provided herein.

5. VBP has filed simultaneously herewith a Motion for Alternative Security Arrangement as permitted by Fla. Stat. § 72.011(3)(b)2 reserving the jurisdiction of this Court with respect to the security requirements of Fla. Stat. § 72.011(3).

6. Venue is proper in this Court pursuant to Fla. Stat. § 72.011(4)(b).

Nature of the Controversy

7. This action seeks to resolve a current controversy between VBP and the Department concerning the propriety of the Department's issuance of an attempted assessment for sales and use taxes and interest thereon (the "Assessment").

8. The Department audited VBP for sales and use taxes for the period January 1, 2004 through December 31, 2006 (the "Audit Period").

9. In its audit of VBP for the Audit Period, the Department sampled certain general ledger accounts and asserted that VBP, as lessee with respect to certain leases of real property, was liable for additional sales and use taxes under Fla. Stat. § 212.031.

10. In addition to asserting that VBP was liable for additional sales and use taxes under Fla. Stat. § 212.031, the Department maintained that VBP was also liable for additional sales and use tax with respect to VBP's purchases of tangible personal property from vendors.

11. On October 27, 2008, the Department issued a Form DR-1215 – Notice of Intent to Make Audit Changes – to VBP with respect to the Audit Period (the "First NOI").

12. On or about August 6, 2010, VBP and the Department executed a Form DR-872 – Consent to Extend the Time to Issue an Assessment or to File a Claim for Refund – extending the time in which the Department could issue an assessment for sales and use taxes to VBP for the Audit Period until March 31, 2011 (the "Extension"). Attached hereto as Exhibit "A" is a true and correct copy of the Extension.

13. By letter dated November 10, 2010, the Department issued a revised Form DR-1215 to VBP making certain revisions to the preliminary determination of tax liability outlined in the First Notice (the "Second NOI"). Attached hereto as Exhibit "B" is a true and correct copy of the Second NOI.

14. The Second NOI referenced a total of nine exhibits relating to various categories of taxable items. The exhibits were A01 and B01-B08.

15. On February 8, 2011, the Department issued a Form DR-831 – Notice of Proposed Assessment – to VBP for sales and use taxes and interest totaling \$3,169,168.74 (the "NOPA"). Attached hereto as Exhibit "C" is a true and correct copy of the NOPA.

16. The NOPA stated that if VBP did not file an informal written protest prior to April 11, 2011 the proposed tax liability asserted in the NOPA would become a "final assessment."

17. The sales and use tax liability asserted in the NOPA did not become an assessment until April 11, 2011. Pursuant to the Extension, the Department was required to issue any assessment with respect to the Audit Period prior to March 31, 2011. Because the NOPA by its terms did not become an assessment until April 11, 2011, the Assessment is invalid in its entirety and must be abated.

Factual and Legal Allegations

18. All factual allegations below are true and correct for all periods during the Audit Period.

19. With respect to the Department's obligation to issue an assessment relating to sales and use taxes under Chapter 212, Florida Statutes, Fla. Stat. § 95.091(3)(a) provides that, effective July 1, 2002, an assessment may only be made by the Department "within 3 years after

the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later.”

20. Notwithstanding the limitations period articulated in Fla. Stat. § 95.091(3)(a), Fla. Stat. § 213.23(1) provides that the Department and the taxpayer can enter into agreements to extend limitations period applicable to the issuance of an assessment.

21. The Department generally uses Form DR-872 as its form agreement with taxpayers for extending the limitations period under Fla. Stat. § 95.091(3)(a) with respect to assessments of taxes.

22. In addition to the Department’s use of Form DR-872 to voluntarily consent to an extension of the period to assess sales and use taxes, Fla. Stat. § 95.091(4) states that the limitations period outlined in Fla. Stat. § 95.091(3)(a) is tolled under certain additional circumstances and provides in pertinent part:

If administrative or judicial proceedings for review of the tax assessment or collection are initiated by a taxpayer within the period of limitation prescribed in this section, the running of the period is tolled during the pendency of the proceeding. Administrative proceedings include taxpayer protest proceedings initiated under s. 213.21 and department rules.

23. Fla. Stat. § 213.21 states that the Department may adopt rules for “establishing informal conference procedures for resolving tax disputes.”

24. The Department has used its authority under Fla. Stat. § 213.21 and promulgated Fla. Admin. Code Ann. r. 12-6.003 relating to informal protests of notices of proposed assessment issued pursuant to a Form DR-831.

25. Fla. Admin. Code Ann. r. 12-6.003 provides in pertinent part:

(1)(a) A taxpayer may secure review of a Notice of Proposed Assessment (Assessment) by implementing the provisions of this

section.

(b) To secure review of an Assessment, a taxpayer must file a written protest postmarked or faxed within 60 consecutive calendar days (150 consecutive calendar days if the Assessment is addressed to a person outside the United States) from the date of issuance on the Assessment.

26. Fla. Admin. Code Ann. r. 12-6.003(2)(b)3 states that if a taxpayer fails to informally protest the issuance of the notice of proposed assessment “the assessment shall become a final Assessment for purposes of Chapter 72, F.S[.]”

27. The Department’s form relating to proposed assessments generally applicable to all taxes administered by the Department is Form DR-831.

28. Form DR-831 is clear that it only reflects a proposed assessment. The body of this form states that:

The Notice of Proposed Assessment (“Notice”) identifies the deficiency, resulting from an audit of your books and records for the audit period indicated. The Department has previously provided you with schedules of the various transactions supporting the basis for the *proposed assessment*. (emphasis added)

29. Form DR-831 also provides that if the taxpayer does not agree with the “*proposed assessment*” it may request review of the proposed assessment through (1) informal protest, (2) administrative hearing and/or (3) judicial proceeding.

30. With respect to the taxpayer’s pursuit of an informal protest of a proposed assessment, Form DR-831 states:

If you file an informal written protest, you must file it with the Department no later than [DATE 60 DAYS FROM THE DATE OF THE FORM], unless you request and receive an extension prior to this date. If you fail to file an informal written protest, the *proposed assessment* will become a FINAL ASSESSMENT on [DATE 60 DAYS FROM THE DATE OF THE FORM]. (emphasis added)

31. Form DR-831 also provides that “[if] a balance is due and you agree with the proposed assessment, please pay the balance due within 60 days of the Notice [the Notice of Proposed Assessment] date.”

32. Form DR-831 is clear that the determinations made therein only relate to a *proposed assessment* – not an “assessment” subject to the limitations period outlined in Fla. Stat. § 95.091(3)(a).

33. Because the taxpayer is given the option to either pay the amount proposed due or file an informal protest prior to the proposed assessment becoming a final assessment, the Form DR-831 is not itself a demand for payment from the taxpayer.

34. Chapter 212, Florida Statutes, addressing sales and use taxes, does not expressly define or otherwise explain the procedural aspects of receiving or protesting a notice of proposed assessment.

35. Chapter 220, Florida Statutes, addressing corporate income taxes, however, clarifies in great detail the significance of receiving and protesting a notice of proposed assessment.

36. The import of the statutory provisions outlined under Chapter 220, Florida Statutes addressing the salient procedural aspects of the Department’s issuance of a notice of proposed assessment with respect to corporate income taxes are directly relevant under Chapter 212, Florida Statutes, with respect to the Department’s issuance of a notice of proposed assessment with respect to sales and use taxes.

37. There is no reason from a tax policy or administration perspective that the statutory provisions addressing the implication of a notice of proposed assessment under Chapter 220, Florida Statutes should not otherwise apply in the absence of guidance under Chapter 212,

Florida Statutes relating to sales and use taxes. In either case, the Department uses the same form to explain the procedural rights of a taxpayer – Form DR-831.

38. Fla. Stat. § 220.709(1) states in pertinent part:

As soon as practicable after a return is filed, the department shall examine it to determine the correct amount of tax. If the department finds that the amount of tax shown on the return is less than the correct amount and the difference is not solely the result of mathematical error, it shall issue a notice of deficiency to the taxpayer, setting forth the amount of additional tax and any penalties proposed to be assessed.

39. Fla. Stat. § 220.703(2) provides:

Whenever a notice of deficiency has been issued, the amount of the deficiency shall be deemed assessed on the date provided in s. 220.713 if no protest is filed or, if a protest is filed, on the date when the decision of the department with respect to the protest becomes final.

40. Tracking the substance of the language in Form DR-831, Fla. Stat. § 220.713

states:

Upon the expiration of 60 days after the date on which it was issued (150 days, if the taxpayer is outside the United States), a notice of deficiency shall constitute an assessment of the amount of tax and penalties specified therein, except for amounts as to which the taxpayer shall have filed a protest with the department under s. 220.717.

41. Making clear that the use of the term “notice of deficiency” is a substitute for the term “notice of proposed assessment,” Fla. Stat. § 220.711 provides that “[a] notice of deficiency issued under this chapter shall set forth, ... , a computation of the adjustments giving rise to the *proposed assessment* and the reasons or reasons therefore.” (emphasis added)

42. Fla. Stat. § 220.717 makes clear the synonymous relationship between the term “notice of deficiency” and “proposed assessment” and states that:

(1) Within 60 days (150 days if the taxpayer is outside the United States) after the issuance of a *notice of deficiency*, the taxpayer may file with the department a written protest against the *proposed assessment* in such form as the department may by regulation prescribe, setting forth the portion or portions of the proposed deficiency protested and the grounds on which such protest is based.

(2) Whenever a protest is filed, the department shall reconsider the *proposed assessment*. (emphasis added)

43. The language used in Fla. Stat. § 220.717(1) and (2) is substantially identical to the explanation of a taxpayer's protest rights found in Form DR-831 and that found in Fla. Admin. Code Ann. r. 12-6.003(1)(b).

44. Under Chapter 220, Florida Statutes, the term "notice of deficiency" is a direct substitute for the term "proposed assessment."

45. Chapter 220, Florida Statutes, makes clear that a "notice of deficiency" - and therefore a "proposed assessment" - is not an "assessment" for limitations purposes under Fla. Stat. § 95.091(3) until after the expiration of the sixty-day period for the taxpayer to file an informal protest.

46. The principles outlined in Chapter 220, Florida Statutes apply for purposes of Chapter 212, Florida Statutes.

47. Because the principles outlined in Chapter 220, Florida Statutes apply for purposes of Chapter 212, Florida Statutes, the proposed assessment outlined in a Form DR-831 is not an assessment for limitations purposes under Fla. Stat. § 95.091(3).

48. The portion of the Assessment attributable to sales and use tax due on rent payments with respect to rentals of real property under Fla. Stat. § 212.031 is improper as VBP paid any and all such tax amounts to its immediate landlord.

49. The portion of the Assessment relating to sales and use tax due on VBP's purchases of tangible personal property from certain vendors is improper as the Department used an improper audit method.

COUNT ONE

BECAUSE THE PROPOSED ASSESSMENT OUTLINED IN THE NOPA WAS ISSUED WITHIN SIXTY DAYS OF THE DATE PROVIDED IN THE EXTENSION, THE DEPARTMENT'S ATTEMPTED ASSESSMENT IS INVALID IN ITS ENTIRETY

50. VBP realleges and reincorporates the allegations of paragraphs 1 through 49 as if fully set forth herein.

51. The Department audited VBP with respect to sales and use taxes under Chapter 212, Florida Statutes, with respect to the Audit Period.

52. The Department and VBP entered into the Extension granting the Department until and including March 31, 2011 to issue an assessment of sales and use taxes under Fla. Stat. § 95.091(3) relating to the Audit Period.

53. The Department issued the NOPA dated February 8, 2011 to VBP asserting a proposed assessment in the amount of \$3,169,168.74.

54. By its express terms, the NOPA provided that VBP could file an informal written protest in response to the proposed assessment referenced therein.

55. VBP did not file an informal protest in response to the NOPA nor did VBP engage in any act that would otherwise toll the applicable limitations period applicable to the assessment for sales and use taxes under Fla. Stat. § 95.091(3).

56. Under Chapter 220, Florida Statutes, a notice of proposed assessment is not an "assessment" for limitations purposes under Fla. Stat. § 95.091(3) until after the expiration of the sixty-day period for the taxpayer to file an informal written protest as stated in the notice.

57. Chapter 212, Florida Statutes, fails to explain the consequence of receiving and protesting a notice of proposed assessment and therefore the guidance outlined in Chapter 220, Florida Statutes applies.

58. Pursuant to Fla. Stat. § 220.703(2) and Fla. Stat. § 220.713, a notice of proposed assessment does not become an assessment for purposes of Fla. Stat. § 95.091(3) until sixty days after the date of the notice of proposed assessment.

59. By its express terms, the proposed assessment outlined in the NOPA did not become an assessment with respect to VBP until April 11, 2011 – eleven days after the date agreed to in the Extension.

60. Because the proposed assessment outlined in the NOPA did not become an assessment until after March 31, 2011 – the date agreed to by the parties in the Extension – and VBP did not act in any way to toll the applicable limitations period for issuing an assessment of sales and use taxes for the Audit Period, the resulting assessment on April 11, 2011 is invalid as outside the limitations period provided by Fla. Stat. § 95.091(3).

COUNT TWO

THE DEPARTMENT INCORRECTLY ATTEMPTED TO ASSESS SALES AND USE TAX WITH RESPECT TO CERTAIN EXEMPT PURCHASES MADE BY VBP DURING THE AUDIT PERIOD

61. VBP realleges and reincorporates the allegations of paragraphs 1 through 60 as if fully set forth herein.

62. During the Audit Period, VBP made certain purchases of tangible personal property from vendors.

63. In the audit of VBP, the Department reviewed sample invoices from certain vendors making sales to VBP in order to evaluate VBP's compliance with Chapter 212, Florida Statutes (the "Vendor Purchase Issue").

64. The Department's audit methodology was such that if sales tax was paid on the sample vendor invoice or if the purchase was otherwise exempt, the Department discarded all related vendor purchases from review. However, if the sample vendor invoice demonstrated inconsistent tax treatment thereby making certain of the purchases thereon subject to sales tax, the Department's audit method was to schedule *all* purchases from that particular vendor as being subject to sales tax.

65. The audit methodology employed by the Department was erroneous, unreasonable and without authority under Florida law and lead to an incorrect assertion of sales and use tax due in Exhibit B05 of the Second NOI.

66. Because the Department's audit methodology was without support under Florida law, the attempted assessed amount with respect to the Vendor Purchase Issue is invalid in its entirety. Irrespective of the propriety of the Department's audit methodology, the amount of the asserted tax liability with respect to the Vendor Purchase Issue was improperly calculated.

COUNT THREE

THE DEPARTMENT INCORRECTLY ATTEMPTED TO ASSESS SALES AND USE TAX WITH RESPECT TO CERTAIN REAL PROPERTY RENTALS

67. VBP realleges and reincorporates the allegations of paragraphs 1 through 67 as if fully set forth herein.

68. During the Audit Period, VBP was a lessee with respect to rentals of certain real property.

69. In the audit of VBP, the Department reviewed certain specific general ledger accounts relating to VBP's rental of real property and storage to evaluate VBP's compliance with Chapter 212, Florida Statutes (the "Rental Issue").

70. In the course of the review of VBP's general ledger accounts, in Exhibit B07 of the Second NOI the Department asserted that sales tax had not been paid with respect to certain rent payments made by VBP as required by Fla. Stat. § 212.031.

71. The Department's conclusions with respect to asserted sales tax owed by VBP for the Audit Period under Fla. Stat. § 212.031 are incorrect.

72. VBP collected and remitted the sales tax due under Fla. Stat. § 212.031 with respect to the Rental Issue for the Audit Period.

73. Because VBP collected and remitted the sales tax due under Fla. Stat. § 212.031 with respect to the Audit Period, the assessed amount with respect to the Rental Issue is invalid in its entirety. However, even if VBP did not collect and remit the sales tax owed under Fla. Stat. § 212.031 with respect to the Audit Period, the asserted tax liability with respect to the Rental Issue was improperly calculated.

WHEREFORE, VBP respectfully requests that judgment be entered against the Department and in favor of VBP:

a. invalidating the Assessment in its entirety as being time-barred pursuant to the governing statute of limitations, the Florida Statutes and the Florida Administrative Code Rules;

b. in the alternative, invalidating that portion of the Assessment relating to the Vendor Purchase Issue due to the Department's failure to use a proper audit method;

- c. in the alternative, invalidating that portion of the Assessment relating to the Rental Issue because VBP has paid all such amounts due and owing; and
- d. Such other relief as is just and equitable.

DATED this 2nd day of September, 2011

AKERMAN SENTERFITT

By: 

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CERTIFICATE OF SERVICE

I certify that I have this day forwarded via U.S. Mail a true and correct copy of the foregoing *Plaintiff's First Amended Complaint* to the following:

Timothy E. Dennis, Esq.
J. Clifton Cox, Esq.
Office of the Attorney General
Revenue Litigation Bureau
PL-01, The Capitol
Tallahassee, FL 32399-1050

THIS the 2nd day of September, 2011.



Michael J. Bowen